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IN THE
Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,
v.
TODD ROKITA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE DR. FREDERIC C. SCHAFFER, DR. LOUIS MASSICOTTE, DR. JØRGEN ELKLIT, DR. TOBY MOORE, AND DR. GRAEME ORR IN SUPPORT OF PETITIONERS [INTERNATIONAL VOTER ID LAWS]

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
SHOSHANA E. BANNETT
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae

November 2007 *Counsel of Record

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INTEREST OF AMICI CURIAE

Amici curiae are scholars who study the administration of elections, both in the United States and abroad. *Amici* offer this brief to explain why the international experience with voter identification laws is not instructive in determining the constitutionality of Indiana's photo identification requirement.[1]

Dr. Frederic C. Schaffer is a political scientist whose research focuses on comparing how elections are administered in countries around the world. Dr. Schaffer is a lecturer on social studies at Harvard University and a research associate at the Center for International Studies at the Massachusetts Institute of Technology. Dr. Schaffer has served as an election specialist or conducted election research in France, Haiti, Senegal, and the Philippines, among other places. He was also one of six experts sent to Baghdad by the International Mission for Iraqi Elections at the behest of the Iraqi government and the United Nations to assess the administration of the December 2005 elections. Dr. Schaffer is the editor of a book on electoral fraud around the world (ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING (Lynne Rienner Publishers 2007)) and the author of a forthcoming book on clean election reform around the world (THE HIDDEN COSTS OF CLEAN ELECTION REFORM (Cornell University Press 2008)).

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have filed letters with the Clerk of the Court consenting to the filing of any *amicus curiae* brief.

Dr. Louis Massicotte is the Research Chair on Democracy and Parliamentary Institutions at the Université Laval (Canada). Dr. Massicotte co-authored ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES (University of Toronto Press 2004), a leading study of the election administration laws of 63 democracies. He has performed pre-election assessments or served as an elections observer in Haiti, Czechoslovakia, Burkina Faso, Mali, Guinea-Conakry, Cameroon, Gabon, Madagascar, Burundi, Liberia, Benin, Congo, and Zaire. Dr. Massicotte has been invited to provide testimony to the US Commission on Electoral Reform and the Senate Committee on Legal and Constitutional Affairs. Dr. Massicotte is also an expert on Canadian elections, having served as the Chief of Policy and Strategic Planning at Elections Canada and a consultant to the Chief Electoral Officer of Canada.

Dr. Jørgen Elklit is a professor of political science at the University of Aarhus (Denmark). His research focuses on electoral systems, election administration, and democratization support in emerging democracies. He has served as an international advisor on elections and electoral systems in Asia, Africa, and Europe and is a leading expert on Danish elections and the Danish electoral system. Dr. Elklit has authored or edited over twenty books, and his publications include *Election Processes and Problems in Weak (and Less Weak) States: Selected Cases and Experiences*, 33 F. FOR DEV. STUD. 283 (2006) and *The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Comparative Politics Research Agenda*, 40 COMMONWEALTH & COMP. POL. 86 (2002).

Dr. Toby Moore is an elections and voting researcher at the Research Triangle Institute. He has served as an international elections monitor and was a project manager at the Center for Democracy and Election Management at American University, where he managed the reform agenda of the Commission on Federal Election Reform chaired by former President Carter and former Secretary of State Baker. Dr. Moore researched the impact of voter identification on minority voters while serving as the geographer of the Voting Section of the Civil Rights Division, U.S. Department of Justice, from 2000 to 2006. Dr. Moore's publications include the forthcoming *The Empirics of Election Reform: A Reply to FEC Commissioner Hans von Spakovsky's Defense of Voter ID*, GEO. PUB. POL'Y REV.

Dr. Graeme Orr is an Associate Professor at the TC Beirne School of Law at the University of Queensland (Australia). Dr. Orr's research focuses on the law of politics, and in particular election law. Dr. Orr is a member of the editorial board of the Election Law Journal, and his publications include AUSTRALIAN ELECTORAL SYSTEMS - HOW WELL DO THEY SERVE POLITICAL EQUALITY? (Democratic Audit of Australia, ANU, 2004) and *Australian Electoral Law: A Stocktake*, 2 ELECTION L.J. 383 (2003).[2]

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[2] *Amici curiae's* affiliations are listed for identification purposes only.

SUMMARY OF ARGUMENT

The international experience with voter identification laws is not instructive in evaluating the constitutionality of Indiana's voter identification law. Fundamental differences in the structure of the electoral systems, the voter identification requirements, the availability of voter identification, and jurisdictions' historical experiences with voter fraud prevent an effective comparison between Indiana and other countries. Moreover, little research exists on the key issue before the Court—whether countries' voter identification requirements result in vote suppression—and available research suggests voter identification laws can disenfranchise eligible voters.

American proponents of stricter voter identification laws have frequently invoked the international experience with voter identification to support their cause. Contrary to their assertions, however, no international consensus exists that voters should be compelled to show photo identification before being allowed to vote. Indeed, established democracies such as the United Kingdom and Australia do not require voters to show identification.

The experience of those countries that do require identification provides little or no insight into whether Indiana's law burdens the exercise of the franchise. Other countries' voter identification laws provide for more flexibility in the types of identification permitted, greater access to identification, and less restrictive alternatives to identification than those found in Indiana's statute. Even if these differences could be ignored, the voter suppression effects of other countries' voter identification laws have not been sufficiently studied.

Moreover, voter identification laws in countries such as Mexico were adopted in response to a societal consensus, which does not exist in Indiana, that voter fraud was prevalent and threatened the legitimacy of electoral outcomes.

In short, *amici curiae* urge the Court to carefully scrutinize claims by defenders of Indiana's law that foreign models support the constitutionality of the Indiana photo identification requirement.

ARGUMENT

I. MANY OTHER ESTABLISHED DEMOCRACIES DO NOT REQUIRE PHOTO IDENTIFICATION.

The vast majority of American states conduct elections without requiring photographic identification[3] and with little to no evidence of in-person voter impersonation fraud. Proponents of photo identification laws have therefore attempted to shift attention to the experience of other countries. One advocate for voter identification has rhetorically asked, "If ID cards threaten democracy, why does almost every democracy except us require them, and why are their elections conducted better than ours?" Robert Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, THE AMERICAN PROSPECT 16.1 at A2 (Jan. 2005). *See also* COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS at 5, 20 (Sept. 19, 2005) (stating that voters in many other democracies use a photo identification card). *But see* BRENNAN CENTER FOR JUSTICE, RESPONSE TO THE REPORT OF THE 2005

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[3] Electionline.org, *available at* http://www.electionline.org/Default.aspx?tabid=364 (Updated Sept. 26, 2006).

COMMISSION ON FEDERAL ELECTION REFORM at 14-15 (2005) (discussing flaws in Commission's analysis of other nations' voter identification laws).

But some of our closest democratic allies do *not* impose photo identification requirements on their electorates. Jurisdictions that allow their citizens to vote without showing photo identification include the United Kingdom (excluding Northern Ireland), Australia, Ireland, Denmark, and New Zealand, as well as nearly all U.S. states. LOUIS MASSICOTTE, ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES, Table 5.1 (University of Toronto Press 2004); Commonwealth Electoral Act (Australia), Part XVI § 229; THE ELECTORAL COMMISSION OF THE UNITED KINGDOM, SECURING THE VOTE: REPORT AND RECOMMENDATIONS at 29 (May 2005). Indeed, as scholars of comparative election laws have noted, "established democracies are less likely [than other democracies] to require voters to identify themselves other than verbally." MASSICOTTE, ET AL., *supra*, at 122.

In short, many established democracies do not require voters to show photo identification. And, as explained below, those countries that do require identification generally have more flexible identification requirements, have more readily available identification, and provide alternatives to identification that are less restrictive than those contained in Indiana's identification law.

II. LACK OF RESEARCH AND VARIATION IN VOTER IDENTIFICATION LAWS COMPLICATE ATTEMPTS TO DRAW CONCLUSIONS ABOUT INDIANA FROM THE EXPERIENCES OF FOREIGN JURISDICTIONS.

That some foreign jurisdictions have imposed voter identification requirements is the beginning of any

comparative analysis, not the end. The constitutionality of Indiana's law fundamentally depends on facts specific to Indiana—*i.e.*, Indiana's history of in-person voter impersonation fraud, if any, and the degree to which Indiana's unique voter identification requirement will disenfranchise voters. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (determining the constitutionality of an election regulation is "very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.") Available research does not show that other countries' identification laws are sufficiently similar to Indiana's to provide an effective comparison, and it does not comprehensively address the effects of foreign laws on voter participation rates.

A. No study has systematically examined the types of identification laws that foreign jurisdictions have adopted.

Not enough is known about the *types* of voter identification requirements in foreign jurisdictions. A leading study that examined whether 63 countries had voter identification laws limited its description of whether an "identification document [was] required" to "yes," "no," or "[i]n some cases only." *See* MASSICOTTE, ET AL., *supra*, at Table 5.1. The study's authors did not explain whether the required identification was photographic, how the identification was disseminated, or whether there were alternatives available to a voter who appeared at the polls lacking valid identification.

Voter identification proponents have also drawn unsupported inferences from a website that lists countries with national identification cards. *See* Privacy.org, "Identity Cards: FAQ," http://www.privacy.org/pi/activities/idcard/idcard_faq.html. Notwithstanding that website's acknowledgement that countries establish identification card systems "for a variety of reasons," mostly unrelated to elections, proponents of voter identification have cited the website for the proposition that "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS at 5 (Sept. 19, 2005). The cited website says nothing, however, about whether photo identification cards are required at elections, much less whether such cards result in disenfranchisement of registered voters or were adopted due to a significant history of voter fraud.

B. Differences in voter identification laws may prevent valid comparisons.

Although no study has comprehensively examined the types of voter identification laws that exist in other countries, there is reason to believe that the specifics of these foreign requirements are not comparable to those found in Indiana's statutes. Indiana's strict voter identification law requires photo identification in all Indiana elections and from all voters, setting aside limited exemptions for the indigent, residents of state-licensed care facilities, and religious objectors. IND. CODE §§ 3-5-2-40.5, 3-11-8-25.1. Non-exempt voters lacking photo identification on the day of election face the added burden of obtaining photo identification within 10 days and making a second trip to complete the voting process, this time to the circuit court clerk or county

election board. IND. CODE §§ 3-11.7-5-1, 3-11.7-5-2.5. Likewise, indigent voters and religious objectors must make a separate trip to the court clerk or county board to exercise their exemption. IND. CODE § 3-11.7-5-2.5. To our knowledge, no research has been done on the disenfranchising effects of a similar voter identification law in another country.

Indeed, the voter identification laws in other countries of which *amici* are aware differ significantly from the Indiana law. In Sweden, for example, the voter identification requirement does not mandate photo identification. It instead provides that "[a] voter who is not known to the voting clerks shall produce an identity document or in another way verify her or his identity." Elections Act (Sweden) 2005, c. 8, sec. 6. Germany requires identification only when the voter does not have a polling notice or when the voter attempts to cast a ballot outside of his or her registered district. MASSICOTTE, ET AL., *supra*, at 121-22. Communities of 5,000 people or less are exempt from France's voter identification law. C. Electoral (France) art. R 60. And Canada's recently-passed law has fall-back provisions that allow voters lacking photo identification to present two forms of non-photo identification or to have a fellow voter vouch for their identity. An Act to Amend the Canada Elections Act and the Public Service Employment Act, Bill C-31, Clause 21.

In other countries, the rules for what constitutes valid identification can be so complex that no reasonable comparison could be drawn between Indiana's law and that of the foreign jurisdiction. In India, ration cards that are issued on or before January 31, 2007 can be used as identification, but only for the head of the family and a spouse or unmarried daughters who accompany the head of the

family to the polling station. *See* Election Commission of India, Order No. 3/4/ID/2007-JS-II (Apr. 4, 2007). India also allows the use of property documents, Kisan-Bahi (a farmer's card) with photograph, pension documents, Freedom Fighter Identity Cards, Arms Licenses, and more to satisfy voter identification requirements. *See* Election Commission of India, Order No. 3/4/ID/2007/J.S.II/(UP) (March 31, 2007).

C. Differences in the availability of identification also undermine comparisons between Indiana and foreign jurisdictions.

Even if the specifics of Indiana's law were sufficiently similar to a foreign country's, voters in the two jurisdictions would also need to have similar levels of access to the required forms of identification in order for an effective comparison to be made—where more people have acceptable identification or can easily obtain it, fewer people will be prevented from voting due to an identification requirement. Again, while no systematic research has compared the availability of identification in nations' voter identification requirements, access levels likely differ significantly from jurisdiction to jurisdiction.

Indiana does not routinely provide free identification to all registered voters. Rather, Indiana places the burden on voters lacking required photo identification to present a birth certificate, a report of birth, or a naturalization certificate *plus* another form of identification, at least one of which must state the voter's residential address, to the Bureau of Motor Vehicles ("BMV") in order to obtain a voter identification card. For those non-indigent voters who have to obtain a birth certificate or other

identification to present to the BMV, Indiana's form of free voter identification is not really free at all.

In contrast, other jurisdictions such as Sweden and Northern Ireland base their voter identification systems on free and widely available voter cards. Elections Act (Sweden) 2005, c. 5, sec. 8; THE ELECTORAL COMMISSION OF THE UNITED KINGDOM, RESEARCH REPORT: THE ELECTORAL FRAUD (NORTHERN IRELAND) ACT 2002: AN ASSESSMENT OF ITS FIRST YEAR IN OPERATION at 21 (2003) (hereinafter "ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND"). In Sweden, the Central Election Authority mails out free voting cards to every person with a known address who is listed on the voting roll, which includes everyone in Sweden's population registration database and land register. Moreover, a Swedish voter can obtain a duplicate voting card simply by providing his or her name and personal identity number. Elections Act (Sweden) 2005, c. 5, sec. 1, 8-10. In Northern Ireland, a voter can obtain a free electoral identity card merely by filling out an application form with the voter's name, postal address, date of birth and national insurance number. If the voter does not have a national insurance number, the voter can instead submit a declaration that they never had a national insurance number. ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND at 26.

In short, differences in levels of access to required identification further inhibit useful comparisons between the Indiana law and voter identification requirements in foreign jurisdictions.

D. Differences in related electoral rules undermine comparisons between Indiana and foreign jurisdictions.

Any useful comparison of two jurisdictions' voter identification laws would also have to take into account other laws that impact voter participation rates. For example, while Belgium requires voter identification, it also makes voting compulsory and provides its citizens with national identity cards beginning at age 12. C. Electoral (Belgium), Titre VI, art. 207-210; Danny DeCock, Christopher Wolf and Bart Preneel, The Belgian Electronic Identity Card (Overview), *available at* http://www.cosic.esat.kuleuven.be/publications/article-769.pdf. Thus, high voter participation rates in Belgium would provide no evidence of the disenfranchisement effects of Indiana's law.

E. The disenfranchisement effects of international voter identification laws have not been sufficiently analyzed.

Regardless of whether the differences between Indiana's law and the voter identification policies of foreign jurisdictions could be reconciled, there is little available research on the vote suppression effects of identification laws in these foreign jurisdictions.

The limited research that has been conducted, moreover, suggests that voter identification requirements can suppress voter participation rates. A study conducted of the voter identification requirements implemented in Northern Ireland in 2002 concluded that "a number of disadvantaged groups were less likely to have identification." ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND at 7. The process to obtain a valid identity card was less costly and far simpler than the process

of obtaining photo identification in Indiana. The Northern Ireland card is free and all that the voter has to do is return one application in a pre-paid envelope. *Id.* at 26. Yet even this easy, free process prevented some voters from obtaining proper identification. One in five applications for the identity card were initially rejected due to incorrect information, and no data has been collected on whether rejected applicants reapplied.

Furthermore, awareness of the identification requirement varied among groups in Northern Ireland. Young adults, students, renters and the disabled showed a lower than average awareness that photo identification was required. For example, only 40% of voters under the age of 24 knew of the requirement. *Id.* at 64. Voters in lower socio-economic brackets were also less likely to know about the photo identification requirement. *Id.* Survey research found that 5 percent of those surveyed would have brought an incorrect form of identification to the polls, and 7 percent did not actually possess a valid form of identification. *Id.* at 64. Among registered voters, 3 percent lacked identification and had not applied for a voter identity card. The numbers were significantly worse for voters in the lowest socio-economic bracket (12%), the disabled (12%), and young adults (13%). In other words, "a significant proportion of people" lacked "the necessary identification" to vote. *Id* at 65.

III. THE PREVALENCE AND CHARACTER OF VOTER FRAUD IN OTHER COUNTRIES IS NOT COMPARABLE TO VOTER FRAUD IN INDIANA.

Voter identification is often a response to a societal consensus that fraud threatens the democratic system of governance. Because of this, democracies

with a recent history of voter fraud are more likely to have photo identification requirements than other democracies. MASSICOTTE, ET AL, *supra* at 122. *See also* Michael Maley, *Transplanting Election Regulation*, 2 ELECTION L.J. 479, 491 (2003) (noting the differences in rates of electoral fraud between established democracies and emerging democracies).

Proponents of voter identification often look to Mexico's experience with voter identification. *See* George W. Grayson, *Registering and Identifying Voters: What the United States Can Learn from Mexico*, 3 ELECTION L.J. 513 (2004); Robert A. Pastor, *What the U.S. Could Learn From Mexico*, L.A. TIMES (July 8, 2006). But as the head administrator for Mexico's electoral agency explained, "all electoral processes are different and their complexity is directly related to their own history, as well as to their specific social and political context." Jose Woldenberg Karakowsky, *Lessons from Mexico*, 12 J. OF DEMOCRACY 151, 151-52 (2001). It is difficult to draw any lessons from the Mexican experience because "Mexico's complex system must be understood as a response to the historical unreliability of [its] electoral processes"—that is, to its history of widespread electoral fraud. *Id.*

Similarly, widespread concern over voter fraud provided the impetus for Northern Ireland's voter identification requirements. As one study explained, there was a consensus in Northern Ireland that electoral fraud had "been a significant factor in the electoral landscape of Northern Ireland for many decades." ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND at 3. Rather than being a partisan issue, "[t]he existence of electoral fraud [in Northern Ireland] is acknowledged on all sides of the

political divide although its scale and level of intensity remain unknown." *Id.* at 15.

In contrast to Northern Ireland, the "level of trust and goodwill" in the electoral process experienced in the rest of the United Kingdom has resulted in "voters . . . not [being] required to produce any form of identification." THE ELECTORAL COMMISSION OF THE UNITED KINGDOM, SECURING THE VOTE: REPORT AND RECOMMENDATIONS at 29 (May 2005).

The lack of any evidence or consensus that in-person voter fraud has occurred in Indiana further differentiates the state from jurisdictions such as Northern Ireland and Mexico. *See Crawford v. Marion County Election Board*, 472 F.2d 949, 953 (7th Cir. 2007). The record before the Court contains no evidence of in-person, voter impersonation fraud in Indiana. Neither the State of Indiana nor its supporters can justify the Indiana photo identification requirement based on jurisdictions whose electoral histories and circumstances differ so significantly from Indiana's.

CONCLUSION

In short, the Court should carefully examine any claim that Indiana's photo identification requirement is justified by the international experience with voter identification laws. Photo identification is not universally required, particularly among well-established Western democracies. Where voter identification is required, the particulars differ significantly from Indiana's law. Moreover, the incidence of vote suppression in those countries that require photo identification has not been adequately examined, and the limited research that has been conducted suggests that there is reason to be concerned about the disenfranchising effects of

identification requirements. The constitutionality of Indiana's law should turn not on poorly-supported comparisons to other countries, but on a careful examination of the specifics of Indiana's law, its vote suppression effects, and the prevalence of fraud in that jurisdiction.

Respectfully submitted,

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
SHOSHANA E. BANNETT
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae

* *Counsel of Record*